No. 14702

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FREDERICK I. RICHMAN,

Appellant,

vs.

LYDA TIDWELL, ROY E. HALLBERG, as Receiver of all the real and personal property constituting the former Richman Trust, and JOHN WHYTE, attorney for Receiver,

Appellees.

LYDA TIDWELL,

Appellant,

vs.

FREDERICK I. RICHMAN, ROY E. HALLBERG, as Receiver of all the real and personal property constituting the former Richman Trust, and JOHN WHYTE, attorney for Receiver,

Appellees.

Brief of Appellees Roy E. Hallberg, as Receiver of All the Real and Personal Property Constituting the Former Richman Trust, and John Whyte, His Attorney.

JOHN WHYTE,
Attorney for Appellee Roy E. Hallberg, as Receiver,

JOHN WHYTE,
In Propria Persona.

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TOPICAL INDEX

Foreword 1

Jurisdictional statement 2

Statement of the case 2

Statement of the case (continued) 4

I.

Preliminary and general statement 4

Statement of the case (continued) 9

II.

Topical statements 9

A. Alleged representations—Receiver's ability, experience and availability 9

B. Petition to disqualify 11

C. Receiver's availability and earnings 12

D. Receiver's services 16

E. Accounting services and experience 20

F. Refrigeration breakdown 21

G. Air pollution—criminal citation 21

H. Receiver's fees 24

I. Objection to Receiver's report 28

J. Attorney's fees 29

The issues presented 34

Summary of argument 34

Argument 35

I.

The District Court did not abuse its discretion in awarding a fee of $6,000.00 to the Receiver and a fee of ~~$18,000.00~~ 1,800.00 to his attorney 35

PAGE

II.

The District Court did not err in ordering the Receiver to reimburse himself from the monies in his possession to the extent of $89.20, paid out of him for copies of his deposition and that of his attorney..... 40

III.

The District Court did not err in refusing to disqualify itself to settle the Receiver's account and to award fees to the Receiver and his attorney..... 41

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Cake v. Mohun, 164 U. S. 311, 41 L. Ed. 447	40
Cash-Papworth, Grow-Sir, In re, 210 Fed. 24	35
Dehner's Estate, In re, 230 Iowa 490, 298 N. W. 656	36
Drilling & Exploration Corporation, et al. v. Webster, 69 F. 2d 416	35
Eames v. H. B. Claflin Co., 231 Fed. 693	39
Griffith, Estate of, 97 Cal. App. 2d 651	36
Kan v. Tsang, 90 Cal. App. 2d 538	39
McLaughlin, Estate of, 43 Cal. 2d 462	36
Missouri & K. T. Ry. Co. v. Edson, 224 Fed. 79	39
Schmitt v. Continental-Diamond Fibre Co., 1 F. R. D. 109	41
Venza v. Venza, 101 Cal. App. 2d 678	35
Walton N. Moore Dry Goods Co. v. Lieurance, 38 F. 2d 186	40

Rules

Federal Rules of Civil Procedure, Rule 54(d)	40
Rules of the United States District Court (So. Dist., Cal.), Rule 18(b)	20
Rules of the United States District Court (So. Dist., Cal.), Rule 18(c)	5, 24

Statutes

Health and Safety Code, Sec. 24242	22
United States Code, Title 28, Sec. 1291	2

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Brief of Appellees Roy E. Hallberg, as Receiver of All the Real and Personal Property Constituting the Former Richman Trust, and John Whyte, His Attorney.

FOREWORD.

In the interest of brevity appellant Frederick I. Richman will hereinafter sometimes be referred to as "Richman," appellant Lyda Tidwell will sometimes be referred to as "Tidwell," appellee Roy E. Hallberg, as Receiver of all the real and personal property constituting the former Richman Trust will sometimes be referred to as "the Receiver" or "Hallberg," and appellee John Whyte, the Receiver's attorney will sometimes be referred to as "Whyte."

JURISDICTIONAL STATEMENT.

This appeal is taken from a final order of the District Court settling the Receiver's account, allowing fees to the Receiver and his attorney, and providing for distribution of funds in the hands of the Receiver. [R. 190-196.] Appellants invoke the jurisdiction of this Court under 28 U. S. C., Section 1291.

STATEMENT OF THE CASE.

That portion of appellant Richman's statement of the case which sets forth alleged facts relating to his specifications of error with respect to the Receiver and his attorney[1] (as distinguished from alleged facts relating to his under the heading, "Statement *Re* Fees—Conduct Resulting in Gross Abuse of Judicial Discretion," which includes the material at pages 16-46 of Richman's opening brief. Such portion of Richman's statement of the case is misleading, biased, incomplete, inaccurate and untrue for the following reasons:

(a) It omits numerous facts material to a determination of the issues herein touching the Receiver and his counsel.

(b) It contains many statements which are unsupported by any reference to the record. By way of illustration, and without attempting to specify every instance, beginning at the top of page 34 of Richman's opening

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[1]Specifications of error, Nos. 3, 5, 6, 7, 8, and 9. (App. Richman's Op. Br. pp. 47-48.)

specifications of error with respect to Tidwell[2]) appears

[2]Specifications of error, Nos. 1, 2, 3, 4, 8, and 9. (App. Richman's Op. Br. pp. 47-48.) It will be noted that Specifications Nos. 3, 8, and 9 assertedly concern both the Receiver and Tidwell. (*Idem,* also pp. 66-71.)

brief three separate declarations of asserted fact are made in as many sentences. Not one of them is supported by a reference to the record. Similarly, in the paragraph immediately following the quoted material on page 42 of said brief several items and amounts are mentioned as being a part of the Receiver's accounting. None of these items is accompanied by a citation to the record, except for the first item which is followed by a reference to the record [R. 110, Ex. 2] that does not support the items.

(c) It is replete with instances where the allusion to the record does not uphold the assertion made. Selected at random are the following examples. At the end of the first paragraph on page 44 there is a reference to "R. 664" as upholding a certain statement. It does nothing of the sort. Again, on page 24 it is asserted that the Receiver "intended to delegate his receivership duties to . . . Miss Cosgrove, the maiden name of his wife," followed by a reference to "R. 380." The record fails to sustain the assertion. The same is true of the statement on page 22 that "Richman could not contact the Receiver after December 18, 1953. [R. 537-538.]"

Accordingly, the Receiver and his attorney deem it necessary to set forth their own statement of the case. In order to aid this Court in comparing the facts recited in their statement with the facts as they are recited in Richman's opening brief, we shall first make a preliminary and general statement of the case, followed by a series of topical statements whose heading and subject matter will correspond closely with the headings and subject matter of subdivisions A to J, inclusive, found on pages 16-46 of Richman's brief.

STATEMENT OF THE CASE (Continued).

I.

Preliminary and General Statement.

On November 30, 1953, the District Court handed down a memorandum decision terminating the Richman Trust, of which appellants Richman and Tidwell (brother and sister) were each a trustor, trustee, and beneficiary, on the ground that Richman had been guilty of undue influence in procuring his sister's consent to the Trust. [R. 3-20.] On the same day the court[3] made an order appointing Roy E. Hallberg, as Receiver of all the real and personal property constituting the former Richman Trust, the bulk of that property consisting of five apartment houses located in the City of Los Angeles, California, and named as follows: Canterbury, Fountain Manor, La Loma, Oliver Cromwell and Western Arms. [R. 21-22, 25.] The approximate value of the trust assets was $1,200,000. [R. 724.]

The order appointing the Receiver fixed his bond at $75,000 [R. 23-24], and on December 2, 1953, the Receiver filed his bond after the same had been approved by the court. [R. 25-26.] Likewise, on December 2, 1953, the District Court made an order authorizing and directing the Receiver to employ Messrs. FitzPatrick & Whyte and John Whyte, as his attorneys.[4] [R. 29-30.]

---

[3]Whenever the word "court" is used herein without further descriptive language, the reference is to the District Court or Trial Court.

[4]Nearly all of the legal services performed by Messrs. FitzPatrick & Whyte in connection with receivership and later in defending the Receiver against the attack made on his report and petition for fees by Richman were performed by John Whyte, as distinguished from his partner, Richard FitzPatrick. Hence, the Receiver will be spoken of as having but one attorney, John Whyte. [R. 542.]

On February 26, 1954, after Tidwell and Richman, the parties to the main litigation, had agreed upon a settlement of their differences, the trial court made an order directing that the Receiver "be relieved of his active duties of management, control and possession of the assets known as the Richman Trust, as of five o'clock p. m., Sunday, February 28, 1954, and that the said Receiver . . . give over control and possession to Lyda Tidwell, plaintiff, of all the assets of the said Richman Trust, excepting money in bank and under the control of the said Receiver . . ." [R. 55-57.] Thereafter, on March 18, 1954, the Receiver filed his first and final report and petition for allowance of "reasonable" fees for his services as Receiver from about December 1, 1953, to and including February 28, 1954. [R. 75-121.] Such petition did not show in what amount fees were being asked, as required by Rule 18(c), Local Rules Southern District, California, for the reason that the Trial Judge had given Whyte permission "to leave it to the court to determine a reasonable amount that the court would not insist upon compliance with the rule that an amount shall be prayed for." [R. 254, 624-625, 938.] On the same day the Receiver's counsel filed his original petition for allowance of fees for legal services performed by him on the Receiver's behalf from about December 1, 1953, to and including March 17, 1954. [R. 58-74.] The attorney's petition prayed for the sum of $3,000.00 as compensation for ordinary legal services plus such further sum as the court might think reasonable for extraordinary legal services.[5] [R. 74.]

---

[5]The request for compensation for extraordinary legal services was prompted by a conversation between Whyte and the Trial Judge in which the court declared that certain work performed by the attorney "was in the nature of an extraordinary service." [R. 939.]

On April 6, 1954, Richman filed lengthy objections and an answer to the report and petitions of the Receiver and his attorney for fees. [R. 125-144.] At a hearing held on April 12, 1954, the court separated the issue of how the money in the hands of the Receiver should be divided between Tidwell and Richman from the issue respecting settlement of the Receiver's report and the allowance of fees to him and his attorney, and fixed May 11, 1954, as the date for commencement of the hearing on the latter issue. [R. 235, 237, 243.] At the same hearing Richman's counsel announced his intention to take the depositions of the Receiver and his attorney [R. 238], and such depositions were taken in April 1954. [R. 871, 922.]

The hearing on the settlement of the Receiver's report and the allowance of fees to him and his counsel actually began on May 12, 1954 [R. 246], at which time the Receiver's attorney filed a supplemental petition for allowance of fees for legal services rendered from March 18, 1954, to and including May 10, 1954. [R. 164-170.] During the course of the proceedings the depositions of Hallberg and Whyte were introduced in evidence. [R. 250, 544.] The hearing continued for approximately four and one-half days, exclusive of final argument. [R. 246, 265, 340-341, 416-417, 439, 540, 613, 635, 700-701, 755.] All of the time spent in the hearing was devoted to defending the Receiver against Richman's attack on his report and petition for fees and to laying a foundation for determining the amount of a reasonable fee to the Receiver, except that a part of one afternoon session [R. 540-571] and a part of one morning session [R. 614-629] were devoted to the attorney's petition for fees.

During the course of the hearing Richman's attorney conceded that his client was not attempting to surcharge the Receiver personally but rather, Mrs. Tidwell, the successful litigant in the main action, and this was so understood by the Trial Court. The statements made in this regard were as follows:

> "The Court: Well, I think the objections as filed did undertake to apply the surcharge against the Receiver, but the statement counsel made in court as to what his objective is, or one of his objectives in the matter here is to have it [392] applied against Mrs. Tidwell, who is not the receiver. Is that right?
>
> Mr. Enright: Yes, your Honor.
>
> The Court: So the Receiver came here upon pleadings which undertook to have him surcharged, but the theory of trial, which was announced rather early in the trial, is that the attempt to surcharge is not against the Receiver, Mr. Whyte's client, but against the prevailing litigant in Tidwell vs. Richman. Does that state it?
>
> Mr. Whyte: Is that your position, Mr. Enright, that you are not now trying to surcharge the Receiver?
>
> Mr. Enright: We surcharged that Receiver. We asked that it be a charge upon the funds in his hands. That is the way we pleaded it. That is the way we stated it in the inception. I am sure the Receiver understood it that way.
>
> The Court: Well, I don't know whether he clearly understood it that way at the beginning, Mr. Enright, because I didn't. And while I have great respect for the Receiver's ability to read and understand, I doubt if, when the court understood originally you were trying to surcharge the man himself, he didn't draw the same conclusion; and apparently Mr. Whyte did.

But it became apparent in this trial settling the Receiver's fees that the attempt is to surcharge the fund, [393] or, as I stated originally, to surcharge Mrs. Tidwell instead of taking it out of the pocket of the Receiver.

Now, has it all been stated clearly?

Mr. Enright: I think so, your Honor. I would like to analyze the record." [R. 617-619.]

"Mr. Whyte: I would like to inquire of the court and [459] inquire of Mr. Enright, whether there is any intention now to shift the position which was expressed this morning, when Mr. Fussell was here, to the effect you were not seeking to charge the surcharge to the Receiver personally for any of these claimed items.

Now, is that correct, Mr. Enright?

The Court: I understand Mr. Enright is seeking to charge the fund which is in the Receiver's possession.

Mr. Whyte: Very well.

The Court: Is that right, Mr. Enright?

Mr. Enright: Yes." [R. 685-686.]

Consequently, there is no issue before this Court with reference to any attempt to surcharge the Receiver, and Specifications of Error, Nos. 3 and 8, appearing at pages 47-48 of Richman's opening brief, should be disregarded insofar as they allege error below in failing to surcharge the Receiver.

On November 19, 1954, the District Court signed and filed a final order settling the Receiver's account, fixing fees, and distributing the funds in the hands of the Receiver. [R. 190-196.] In this order the court found the first and final report of the Receiver to be true and correct. [R. 193.] The court further found the sum of

$6,000 to be the reasonable value of the Receiver's services and the sum of $1,800 to be the reasonable value of his attorney's services, and it fixed their respective fees at such amounts. [R. 194.] The court also directed that the Receiver reimburse himself from the monies in his possession to the extent of $89.20 paid by him for copies of the depositions used at the hearing on his report and petition for fees and his counsel's petition for fees. [R. 195.]

Appellant Richman has appealed from the whole of this order of November 19, 1954. [R. 196-197.]

STATEMENT OF THE CASE (Continued).

II.

Topical Statements.

A. Alleged Representations—Receiver's Ability, Experience and Availability.

At pages 16-19 of his opening brief Richman strives to create the impression (which, as we shall see, is wholly unwarranted) that at the hearing on November 30, 1953, at which the District Court announced its intention to appoint Hallberg as Receiver, Hallberg made certain representations, some or all of which were untrue. To this end he quotes several statements made by the court on that occasion (Richman's Op. Br. pp. 16-19) but mentions no statements made by Hallberg, except that the Receiver "chimed in" with the remark "That is correct" at the close of one of the court's observations (Richman's Op. Br. p. 17), affirmed that he had a place of business in Pasadena (*Idem,* p. 19), and responded in the affirmative to the court's inquiry as to whether he lived at Corona del Mar. (*Idem,* p. 19.) While the trial court was of the opinion that the Receiver had made no represen-

tations ("The Receiver didn't come to the court and make any representation") [R. 235], to the extent that such "chiming in," such affirmation, and such response may possibly be construed as representations by the Receiver, they were truthful in every particular.

Insofar as they contained any declarations of fact, the court's observations to which Hallberg replied, "That is correct," were as follows (Richman's Op. Br. p. 17):

> "The Court: . . .
>
> ". . . I have explained to them that you have had experience in this type of work in Chicago, that your main vocation for some years was in the management of real properties, sometimes in connection with court receiverships, and that your experience in it locally has been in the management of your own real properties, which were of income nature, and of similar properties owned by either you or your wife's relatives.
>
> Mr. Hallberg: That is correct."

During the years 1930-1931, in Chicago, Illinois, Hallberg's main vocation was the management of real properties in connection with a court receivership. [R. 377-378, 381-383, 465-466, 884-885.] He also had local experience in the management of real properties of an income nature owned by himself and his wife, consisting, among others, of a 16 unit apartment building in South Pasadena and a four family unit in Pasadena. [R. 369-370, 881-882, 889-891.]

Furthermore, his affirmation that he had a place of business in Pasadena was perfectly truthful inasmuch as the four family unit owned by him and his wife in that city certainly qualifies as a place of business. As for his affirmative response to the question of whether he lived at Corona del Mar, that was the fact. [R. 255.]

It is significant to note that at this same hearing on November 30, 1953, Richman's counsel expressed his complete confidence in the Receiver's integrity and ability when he stated, "I am satisfied that your Honor would not have selected anyone except a man of not only integrity, but of ability." (Richman's Op. Br. p. 18.) It is of further significance to note that before appointing Hallberg as the Receiver the Trial Court invited counsel for both Richman and Tidwell to ask the Receiver any questions they wished, but no questions were asked. [R. 210-216, 259.]

B. Petition to Disqualify.

On April 30, 1954, prior to the hearing on the Receiver's report and petition for fees and the petition of his attorney for fees, appellant Richman filed a petition to disqualify Honorable Ernest A. Tolin, the District Judge, upon the ground that the Judge was a material witness to the determination of what fees should be paid the Receiver in that the Receiver had made certain allegedly false representations to the court before his appointment when the court was interviewing him with respect to his availability, experience and qualifications. [R. 158-164.] The petition to disqualify further alleged that it would be necessary for Richman to call the Trial Judge as a witness to these alleged misrepresentations. [R. 162.]

As we have just seen, if the Receiver can be said to have made any representations to the court before his appointment, his statements were entirely truthful. Moreover, everything said at the hearing at which it is claimed that the Receiver made such representations was transcribed by the court reporter and is a part of the record on this appeal. [R. 202-216.] The Receiver never repudiated any portion of the transcript of that hearing.

Under these circumstances it would have been wholly unnecessary for Richman to have called the Trial Judge as a witness to any alleged representations made by the Receiver at the hearing.

C. Receiver's Availability and Earnings.

With respect to Hallberg's availability to act as Receiver, the record reveals the following:

At the time he took his oath of office as Receiver on December 2, 1953, Hallberg did not know that he would be employed by the County of Orange. [R. 363, 378-379, 355-357.] His work for the County did not begin until December 7, 1953. [R. 326.] He had no definite hours of employment but was merely required to put in a 40 hour week of eight hours a day, Monday through Friday. [R. 327-328, 335, 343, 346-347.] About half of his work consisted in the preparation of data with regard to assessing and appraising; such work could be done outside the office or at his home in the evenings. [R. 356-360.]

At the time it appointed Hallberg as Receiver the District Court envisaged his job as only "part-time employment." In this connection the court said:

> "The Court: . . .
>
> . . . . . .
>
> Knowing that Mr. Richman had carried on other ventures [19] while he managed these properties, I thought that while it would be part time, it would be a substantial part-time employment, and having confidence in the man's integrity and ability, I asked him if he would serve and he said he would." [R. 257-258.]

Concerning the time which he personally spent on the receivership, Hallberg testified as follows:

> "Q. (By Mr. Enright): Actually, the physical method of operation was that commencing December 7th and all through February 28th, and you would make trips up to Los Angeles on the weekends or come up Friday night after completing your work for the County of Orange, isn't that right? A. I came up during the week. I came up Friday, it is true. I was there Saturday. I was even there on Sunday.
>
> Q. Friday evening, Saturday and Sunday? A. During the week I was there on various occasions." [R. 434-435.]

> "Q. Well, generally, didn't you do your checking on the operation of these apartments on the week end, [89] Mr. Hallberg? A. I did some of that.
>
> Q. I mean, that was the rule, wasn't it? A. Not necessarily.
>
> Q. You'd come in on week ends, Saturdays and Sundays? A. Not necessarily. I came in during the week some evenings, as well as days. * * *" [R. 905.]

When one of the apartment house managers was asked on how many occasions she had seen Hallberg during the three month's period of the receivership, she replied:

> "A. I would say between seven, not less than twelve times; perhaps seven, eight or nine times." [R. 503.]

Another apartment house manager, who testified that she saw Hallberg on only three occasions during the receivership [R. 476-477], admitted that she was frequently off-duty, either in her room or away from the building,

in which event she would not have seen the Receiver. [R. 477-479.]

During the entire course of the receivership Hallberg had the assistance of a full-time bookkeeper [R. 270]; first, Mr. Harrison, who had been Richman's secretary and bookkeeper [R. 410-411], and then Miss Findeisen. [R. 270.] He also was materially assisted throughout by his wife, who represented him in many of his contacts with the apartment house managers and with various service and trades people. [R. 263-264.] In addition Mrs. Hallberg supervised the decorating of apartments, made periodic trips to collect the rents and deposited them in the bank, purchased supplies, and helped with the bookkeeping. [R. 263-265, 267-268.] She received no compensation for any of her services to the receivership. [R. 269.]

At the same time that he was managing the affairs of the Richman Trust from 1945 to 1953, Richman was carrying on a private law practice in the City of Los Angeles, which included such matters as the organization of corporations, the preparation of tax returns, and the drafting of contracts. [R. 528-529, 713-714.] During his last year as manager of the Richman Trust, he devoted considerable time to preparing for and attending the trial of Mrs. Tidwell's action against him to terminate the Trust. [R. 714-715.] From January, 1950, until after the Trust was terminated, he also acted as President of the Consolidated Mortgage Company. [R. 731-732.]

With respect to Hallberg's earnings and experience prior to the receivership (exclusive of his accounting experience, which will be mentioned later), the record reveals the following:

He majored in business administration at Northwestern University where he received the degree of Bachelor of Science and Commerce in 1927. [R. 290.] From 1930 to 1931, in Chicago, Illinois, he was employed by a receiver on a full-time basis to manage certain real properties in receivership. The properties consisted of from 40 to 50 buildings, including apartments, a large apartment hotel, flats, bungalows, and residences. One of these buildings, an apartment hotel, was quite similar to the Oliver Cromwell apartment building in the Richman Trust. The buildings as a whole were of about the same class as the Richman Trust buildings. [R. 377-378, 381-383, 465-466, 884-885.]

For a period of 13 years before January 1947, he was employed by the Garrett Company, wine merchants in New York. [R. 367-368.] During his last three or four years with this company he received an annual net compensation (before taxes) of $40,000. [R. 891-892, 367-368.] He came to California about January 1947, as Western Regional Sales Manager for Refrigeration Corporation of America at a salary of $10,000 a year, plus an override based on volume. [R. 875.] From the time of his arrival in California in 1947, until he moved to Orange County in 1952, he resided in the City of Pasadena. [R. 367-368.] He remained with Refrigeration Corporation of America for about two years, when the company dissolved. [R. 875.]

About 1949 Hallberg began having trouble with his back—for months he was in bed and in the hospital—and accordingly his employment record from then until the time of the receivership was spotty. [R. 875-876, 366-367.] Nonetheless, he received a yearly salary of $20,000 while employed by Hall Industries, a seller of curtain rods, from October 1948 to April 1951. [R. 879-881.] About

December 1949, he and Mrs. Hallberg purchased a 16 unit apartment house in South Pasadena, which they held for approximately 11 months, and in which they installed Mrs. Hallberg's mother as manager. [R. 369-370, 889-890.] Hallberg himself performed many of the managerial duties [R. 369-370] and even did hard physical work on the premises, including painting, carpeting, hanging doors, laying floor tile, and repairing the roof. [R. 463-464, 910-911.] About January 1951, Mr. and Mrs. Hallberg also purchased a four unit apartment building in Pasadena, which they still own. [R. 370, 882, 890-891.]

Mrs. Hallberg received the degree of Bachelor of Business Administration from the University of Minnesota in 1932. [R. 516.] For a time she was one of two women investment counselors in New York. [R. 516.] She took a year's course in color consulting at the Traphagen School of Design in New York and was color consultant for certain properties in that city. [R. 517, 385.] She holds a real estate broker's license in California. [R. 269, 270.]

D. Receiver's Services.

The Receiver's active duties with regard to the management and operation of the former Richman Trust began about December 1, 1953, and continued until February 28, 1954. [R. 255.] The nature of the services performed by him during this period is too varied and extensive to relate in detail, but in general it consisted in handling the myriad problems which arise in connection with the operation of five large apartment houses, such as maintenance and renovation of the buildings, collection of rents from tenants, the employment and discharge of personnel, making provision for various types of insurance, preparation and filing of a tax return, keeping of

books of account (the Receiver set up a new and improved bookkeeping system), and the purchase of supplies; as well as in conferring with representatives of government agencies, inspecting the buildings from time to time to determine whether their physical plants were in good working order, comparing the rentals with other apartment buildings in the neighborhood, and appearing in court at various hearings. [R. 77-84, 261-262, 281-284, 287-290, 293-295, 892-896, 912-913.]

On February 26, 1954, the District Court made its order relieving the Receiver "of his active duties of management, control and possession of the assets known as the Richman Trust, as of five o'clock p. m., Sunday, February 28, 1954," and directed the Receiver to "give over control and possession to Lyda Tidwell, plaintiff, of all the assets of the said Richman Trust, excepting money in bank and under the control of the said Receiver, . . ." [R. 56.] On the same day the Receiver was informed of the sum and substance of this order by his attorney. [R. 417-419.]

In his statement of the case Richman asserts in substance that the Receiver violated the terms of this order in at least three particulars, to wit:

1. He failed to retain control of the petty cash fund of $785 in the hands of the apartment house managers.

2. He failed to collect from the managers the rents which had been collected by them on February 26, 27, and 28, 1954.

3. On February 27, 1954, he made a monthly payment of $2,027.25 on a trust deed on one of the apartment houses which was not due until March 1 of the same year. (Richman's Op. Br. pp. 31-32, 43-44.)

A proper understanding of the facts will show that the Receiver did not violate the terms of the above mentioned order in any one of the particulars specified.

First, with respect to the minor amounts of petty cash in the hands of the managers, totalling $785, these funds were used to pay small day-to-day expenses, such as key refunds, salaries of extra help, gratuities to persons removing cans or other "stuff" from the apartment buildings, etc. [R. 480-482, 419-420.] These funds were not lost or dissipated but were simply left in the buildings and became the property of Mrs. Tidwell when she took over their control and possession as of 5:00 P. M. on Sunday, February 28, 1954. [R. 420-421.] The Receiver did not take possession of these funds for the good and sufficient reason that they were a part of the working properties of the buildings [R. 420-421] and therefore necessary to their continued operation. In this regard the Trial Court declared in substance in its memorandum to counsel, dated October 5, 1954, that the petty cash fund existed merely "as an operating incident of each apartment house so that the resident managers would have available small sums of money for the purposes that are common to the day-to-day business transacted by resident apartment house managers." [R. 182, 185-186, 188.]

Second, with respect to the rents collected by the managers on Friday, Saturday and Sunday, the 26th, 27th and 28th of February 1954, they amounted to $1,290.59. [R. 601.] Hallberg did not collect these monies from the managers for two cogent reasons: (1) the period in question being a week end, the banks were closed, and inasmuch as the Receiver's office had no safe there was no facility available for their secure deposit except the safes at the apartment houses [R. 910]; and (2) Hall-

berg was prevented from collecting them by reason of the fact that Mr. Udall, Mrs. Tidwell's agent, made the rounds of the apartment houses on Sunday, February 28, told the managers that he was in charge, and collected these monies himself. [R. 932-933, 420, 429-430.] In this connection it appeared that these monies represented payments made by tenants in advance on account of their rent due on the first of March [R. 182-183], wherefore these funds rightfully belonged to Mrs. Tidwell under the terms of the aforesaid order of February 26, 1954.

Third, with respect to the payment by Hallberg on February 27, 1954, of an installment on a trust deed not due until two days later [R. 423], it should be observed that under the language of the Court's order of February 26, 1954, the Receiver's "active duties of management, control and possession of the assets known as the Richman Trust" continued until 5:00 of the afternoon of February 28. [R. 56.] Thus, at the time he made the payment on February 27, he had ample power to do so. Moreover, the Trial Court was of the opinion that it was not unwise of him to pay a debt of the receivership two days in advance of its due date. [R. 186, 868-869.] It is significant to note that during his term as manager of the Trust Richman himself sometimes made the payments on the same trust deed in advance of their due date. [R. 535-536.]

In conclusion, it should be noted that not one penny of any of the three items discussed above was lost or dissipated. Thus, even if it be assumed for purposes of argument that the Receiver did commit some technical violation of the Court's order of February 26, 1954 (an assumption which we believe to be wholly unwarranted), such violation was productive of no harm to anyone.

E. Accounting Services and Experience.

As previously stated, the Receiver always employed a full-time bookkeeper during his term as Receiver. [R. 270.] For about two-thirds of that term the bookkeeper, Mr. Harrison, was the same bookkeeper who had kept the Trust books while Richman was managing the assets. [R. 270, 410-411, 533.] Hence, insofar as bookkeeping problems were concerned, the Receiver's duties were mainly supervisory.

Hallberg had had sufficient accounting training and experience to render him capable of exercising such supervision. In his college days at Northwestern University he took two years of accounting and did part-time accounting work while going to school. [R. 911-912.] He had two years public accounting in the field in Chicago. [R. 737.] He had the "complete management" of the 40 to 50 buildings in receivership in Chicago in 1930-1931 [R. 377-378, 381-383, 884-886], which presumably must have included supervision of their books of account. He also did some of the bookkeeping for Morgan Construction Tooth Corporation in 1951 [R. 448-449, 878], and apparently he set up the books for Hall Industries [R. 737] with whom he was associated from October 1948 to April 1951. [R. 879-881.]

Insofar as Richman may be attempting to discredit the Receiver and his counsel for not having filed an accounting within 60 days after the Receiver's appointment, as required by Rule 18(b), Local Rules Southern District, California (Richman's Op. Br. p. 33), the Trial Court completely absolved Hallberg and Whyte from any blame in this regard. [R. 868.]

F. Refrigeration Breakdown.

Richman's partially unsupported and much distorted statement of the case under this subdivision seeks to show that Hallberg was remiss in the performance of his duties as Receiver with respect to this refrigeration problem. It is only necessary to exhibit the facts in their proper perspective in order to refute any such charge against Hallberg.

About the middle of January 1954, trouble developed with the refrigeration equipment at the Western Arms apartment building. [R. 284.] In accordance with instructions previously given her by the Receiver, the manager called representatives of the California Refrigeration Company who went to work on the matter promptly. [R. 284.] A report of the trouble was made to the Receiver on the evening of the same day, and he was told that the refrigeration repairmen were on the job. [R. 285.] Before noon of the following day the Receiver began conversations with the representatives of two refrigeration companies and instructed one of these companies to finish the job of repair. [R. 286, 435-439.] The Receiver personally visited the apartment house two days after the breakdown and found the refrigeration system working perfectly. [R. 435-436, 525.]

G. Air Pollution—Criminal Citation.

Here, again, it is only necessary to state the facts fully and accurately in order to demonstrate that the Receiver and his attorney acted properly and prudently in handling an air pollution problem resulting from a defective incinerator at the Oliver Cromwell. The sequence of events was as follows:

About December 3, 1953, Richman turned over to the Receiver certain contracts which he had made with Air Pollution Control, Inc. for the installation of air pollution control equipment in the incinerators at the Oliver Cromwell and Canterbury apartment houses. [R. 387.] About December 10, the Receiver received an authorization from the County of Los Angeles for the installation of such equipment [R. 387-388], and not long afterwards he received engineering drawings of the equipment to be installed by Air Pollution Control, Inc. [R. 388.]

On December 24, 1953, the Receiver asked his attorney to examine these contracts. [R. 940, 388.] The attorney did so and returned them to the Receiver about December 30, at the same time orally advising the Receiver that "the contracts were valid and binding, that they should be carried out." [R. 556-557, 388-389, 753, 941.]

About January 1, 1954, the Receiver instructed his bookkeeper, Harrison, to mail the engineering drawings to Air Pollution Control, Inc., which Harrison failed to do. [R. 753, 405-406, 518-519.] Subsequently, about January 13, the Receiver received a notice from the Los Angeles County Air Pollution Control District charging that the Oliver Cromwell was violating Section 24242 of the California Health and Safety Code by discharging excessive smoke from its incinerator. [R. 711, 388-389.] Shortly after receipt of this notice Harrison telephoned Mr. Manalis, the vice-president of Air Pollution Control, Inc., and instructed his company to proceed with the installation at the Oliver Cromwell. [R. 646, 519-520.] With regard to the notice from the Air Pollution Control District, Manalis told Harrison that he "would take it up with the Air Pollution Control Authority, we weren't to worry, and he would take care of it." [R. 520, 405.]

On January 22, 1954, Hallberg found the drawings for the air pollution control equipment at his office at the Oliver Cromwell [R. 642], Harrison having failed to carry out the instructions given him about the first of the month to forward them to Air Pollution Control, Inc. [R. 753, 405-406, 518-519]. Hallberg immediately wrote a letter to Air Pollution Control, Inc. enclosing the drawings. [R. 646-647.]

Either on January 27 or January 29, 1954 (the record is not clear), a criminal complaint was issued by the County of Los Angeles naming Richman and one of the apartment house managers as defendants. [R. 406-407.] In any event the record is clear that Whyte had no knowledge that Richman had been named as a defendant in the complaint until January 29, when he was so advised by Harrison. [R. 558, 639-641, 940.] Whyte immediately tried to get in touch with Richman and his counsel but was unable to locate either of them, whereupon he left word at Richman's office between 4:00 and 5:00 P. M. on January 29, concerning the pendency of the suit and the fact that a hearing therein had been set for the morning of February 1. [R. 407.] Mr. Joseph T. Enright, representing Richman, and Whyte, representing the Richman, and apartment house manager, appeared at the hearing, and upon their joint request the matter was continued. [R. 960-961.] Thereafter, at a conference on February 9 with the representative of the Los Angeles City Attorney's Office in charge of the case, Hallberg, Whyte and Richman's counsel persuaded him to dismiss the suit. [R. 965-966.] At no time was anyone fined or was any financial penalty exacted from the Trust assets on account of the filing of the suit or delay in installing the air pollution control equipment. [R. 753.]

A final key fact, which is vital to any fair statement of the facts under this heading and which does not appear in Richman's brief, is the admission by Mr. Manalis of Air Pollution Control, Inc. that for a period commencing from ten days to two weeks before January 15, 1954, and continuing until three or four weeks after January 15, 1954, a particular type of metal needed for the installation of the air pollution control equipment at the Oliver Cromwell and the Canterbury was not available to his company, wherefore the company was unable to make the installation during this period in the absence of such metal. [R. 704-707, 709, 547-549.] Hence, even if it be assumed that Hallberg and/or Whyte failed to act as reasonably prudent men in dealing with the matter under consideration (an assumption which, as we have seen, is not supported by the facts), any failure on their part to conform to standards of due care was not the proximate cause of the issuance of the criminal complaint for the reason that even if they had they acted with all possible skill and dispatch, the installation still could not have been made before the complaint was issued because Air Pollution Control, Inc. did not have the necessary materials to make the installation.

H. Receiver's Fees.

At the beginning of this subdivision of his statement of the case Richman devotes several pages of his brief to an effort to make capital of the fact that the Receiver did not specify in his petition for fees the amount of the fee he was asking for, as required by Rule 18(c), Local Rules Southern District, California. (Richman's Op. Br. pp. 37-40.) The District Court explained this failure to abide by the Local Rule by declaring that it had given permission to the Receiver and his counsel in preparing

their petitions for fees that "if they wanted to leave it to the court to determine a reasonable amount that the court would not insist upon compliance with the rule that an amount shall be prayed for. But they could leave it as reasonable or they would state a specified amount." [R. 254.] The District Court further asserted that "I felt at the time . . . that asking for reasonable fees and leaving it to the court to determine what they should be upon hearing the evidence was the better practice." [R. 625.]

There is abundant evidence in the record to sustain the Trial Court's finding that the reasonable value of the Receiver's services is the sum of $6,000. [R. 194.] In this connection the court heard the testimony of Mr. Jefferson Mann, a licensed real estate broker and real estate appraiser, who for 21 years was connected with R. A. Rowan & Co. in Los Angeles, the second largest real estate management firm in the West. [R. 298-299.] After first being qualified as an expert witness with respect to the management of real estate, including apartment buildings, and the compensation paid for such management in the Los Angeles area [R. 298-299, 308-310], Mann testified that based on the size of the receivership estate (it was valued at approximately $1,200,000) [R. 724], the duties performed by the Receiver, his education and past employment, the size of his bond ($75,000) [R. 25-26], and the amount of gross receipts during the period of the receivership ($94,153.59) [R. 105], he was of the opinion that the reasonable value of the Receiver's services was 5% of gross income, or $4,707.67. [R. 301-306, 316, 324-325.]

Although the fee allowed by the District Court was about $1,300 in excess of this figure, the Court was amply justified in increasing the amount of Mann's estimate.

In explaining why it fixed the Receiver's fee at $6,000, the Trial Court stated:

> "The Receiver has not prayed for a specific sum in compensation for his services but has set forth in detail what his services consisted of and prays for reasonable fees. The Court bears in mind that Defendant has testified that ten per cent of the gross income was a reasonable management fee when Defendant rendered the management service. In procuring the contract with Plaintiff for that fee, there was an over-reaching and undue influence. That fee was excessive. The Court bears in mind, also, that there is evidence in the record that various percentages including five per cent and six per cent would be a reasonable management fee. The Receiver in this instance acted as a property manager with the obligations of full trustee and of an officer of the Court. Mr. Richman, with whom he had to deal, is a person given to hostile and aggressive attitudes. It is evident that he exercised these in his relations with the Receiver. The Receiver was obliged to go through the problem of setting up his own management plan. [234] He was only allowed to execute the plan for a brief period before the receivership was abruptly terminated. He was placed in possession hurriedly and he was terminated abruptly. It then became necessary for him to file an accounting, and the accounting procedure was exhausted to its ultimate in searching into the conduct of the Receiver during and even before his stewardship. He spent several days in Court defending the administration of his trust and undergoing a most critical and insulting scrutiny of his every act and omission in his administration. The Receiver's fee is fixed in the sum of $6,000.00, that being the reasonable value of his services, with some consideration given to the greater than usual vexation which was visited upon

him and the labors of making up his accounting and explaining and defending it in Court. The Court finds it to be a true and correct account." [R. 186-188.]

As to the manner in which the Receiver was treated by Richman and his counsel, the Court remarked:

"The Court: . . .

"He was brought before the court almost as if he were accused of a crime here and was treated by some of the parties to the suit, or by one of the parties to the suit and one of the attorneys to the action with less respect than I have seen embezzlers treated when I was handling the criminal calendar of the court." [R. 857-859.]

On pages 41-42 of his opening brief Richman attempts to compare the total amount of expenses incident to the operation of the receivership, including fees allowed the Receiver and his attorney, with the amount which would have been paid to him under his contract with the Trust had be been managing the assets during the period of the receivership. He concludes that the receivership expenses were about $400 more than they would have been had he remained in control. Apparently the purpose of this comparison is to show, if he can, that the fees of the Receiver and his attorney are too high.

Wholly apart from the fact that several of the figures upon which he bases his calculations are not supported by the record,[6] and the further fact that he fails to mention certain items which would have increased the Trust expenses had he been in the saddle during the period

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[6] *E. g.*, see the paragraph immediately following the quoted material on page 42 of his opening brief.

of the receivership [R. 605-606], his comparison is misleading and of little value. This is true because the Receiver's duties were much more burdensome than they would have been had he, like Richman, been in control of the assets for an extended period and thus had had time to put the Trust affairs on a normal well-oiled day-to-day basis. Here, however, the Receiver was confronted with the task of taking possession of unknown properties and familiarizing himself with them, installing his system of management and setting up his books, and then, only three months later, being compelled to close the books and surrender possession of the assets.

I. Objections to Receiver's Report.

We have already discussed all of the items mentioned in this subdivision of Richman's statement of the case under previous headings, except (1) the failure to pay Richman's claim in the sum of $3,104.22, and (2) the alleged failure by the Receiver to account for a $400 deposit on Workmen's Compensation and an alleged refund thereon of $158. (Richman's Op. Br. p. 44.)

With respect to (1) above, although Richman did claim that he was entitled to a management fee of $3,104.33 for his services to the Trust in November, 1953, Hallberg never received a bill or other communication from him stating that this amount, or any other amount, was due him. [R. 426-427.] Actually it would have been most unwise for the Receiver to have paid this claim inasmuch as the District Court later held that the amount claimed was based on a charge of 10% of gross income of the Trust as fixed by a contract under which the Trust had been established, and that because the Trust had been set aside for undue influence, the contract rate was no longer applicable and Richman was entitled

to payment on a *quantum meruit* basis only. [R. 182-183.] The Court ultimately fixed Richman's management fee for such service at $1,862.60, or 6% of the gross revenues of the Trust in November, 1953. [R. 194-195.]

With respect to (2) above, the Receiver did account for the $400.00 deposit on Workmen's Compensation. [R. 107.][7] As for the Receiver's alleged failure to account for a refund on this deposit, he could not have done so because no refund was shown to have been received by him during his term as Receiver. [R. 661-662; 667-669.][8]

J. Attorney's Fees.

Strangely enough, this subdivision of Richman's statement of the case does not challenge as unreasonable the fee of $1,800.00 actually allowed the Receiver's attorney but instead attacks the amount prayed for in the attorney's petition for fees, namely, $3,000.00 for ordinary services and an unspecified amount for extraordinary services, as being excessive. (Richman's Op. Br. pp. 44-46.) That the sum of $1,800.00 which was in fact allowed is an exceedingly modest fee is shown by the following facts:

The attorney's original petition for fees, filed March 18, 1954, sought an allowance of fees for services performed by him on behalf of the Receiver from about December 1, 1953, to and including March 17, 1954. [R. 58, 74.] The services rendered during this period consisted, among

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[7]The statement at page 44 of Richman's opening brief that the Receiver did not account for this item is just another illustration of the inaccuracy and unreliability of his brief.

[8]The assertion on page 44 of Richman's opening brief that the Receiver turned the refund "over to appellant Tidwell. [R. 664.]" has no support in the record.

others, in advising the Receiver or his agents, on an average of at least three days a week during the entire three month's period of the receivership, with respect to numerous problems connected with the administration of the receivership; preparing petitions, such as a petition for authority to pay Christmas bonuses and a petition for authority to renovate individual apartments; court appearances in obtaining approval of such petitions; frequent telephone calls from and to the attorneys for Richman and Tidwell regarding the progress of the receivership and problems incident therein; conferences and a court appearance in connection wtih the dismissal of the criminal complaint hereinbefore discussed under subdivision G; conferences regarding termination of the receivership; and preparation of the Receiver's first and final report and petition for fees. [R. 60-72, 541-542, 951-967.] Whyte had practiced law in Los Angeles for more than 12 years prior to his appointment as attorney for the Receiver. [R. 967-968.]

On May 12, 1954, Whyte filed his supplemental petition for fees for the period commencing March 18, 1954, to and including May 10, 1954. [R. 164-170.] These services included, among others, representing the Receiver upon the taking of his deposition and conferring with him and his wife and with other potential witnesses in preparing his defense to Richman's attack upon his report and petition for fees. [R. 166-169.]

As previously noted, the hearing on the Receiver's report and petition for fees began on May 12, 1954, and lasted for four and one-half court days, excluding final argument. [R. 246, 265, 340-341, 416-417, 439, 540, 613, 635, 700-701, 755.] Except for a part of one afternoon session [R. 540-571], and a part of one morning ses-

sion [R. 614-629] when the subject of Whyte's fees was under consideration, the hearing was devoted exclusively to defending the Receiver against the attack on his report and petition for fees and to laying a foundation for determining the reasonable value of his services. Whyte acted as the Receiver's attorney throughout the hearing.

Hubert F. Laugharn, Esq., a Los Angeles attorney specializing in bankruptcy and liquidation matters, was qualified as an expert witness with regard to receivers and receiverships. [R. 559-561.] Upon the basis of the facts alleged in Whyte's original and supplemental petitions for fees, and in view of the size and extent of the receivership estate, and the problems encountered during the receivership, Laugharn expressed the opinion that compensation of $1,000.00 per month for each of the three months of the receivership would not be excessive. [R. 561-565, 568.]

With reference to the compensation due Whyte for defending the Receiver in court against Richman's attack on the Receiver's report and petition for fees,[8a] Paul Fussell, one of the senior partners in the Los Angeles law firm of O'Melveny & Myers, was qualified as an expert witness [R. 614-616] and testified that based upon the size of the receivership estate, the objections made by Richman to the Receiver's report and petition for fees, and the time consumed by Whyte in defending such report and petition for fees against Richman's attack thereon, he was of the opinion that the reasonable value of Whyte's services in conducting the defense was between $1,000.00 and $1,200.00. [R. 616-619.]

[8a]Whyte has never sought compensation for the time spent by him in defending his own petition for fees against Richman's attack thereon. [R. 624.]

Whyte is criticized at pages 44-45 of Richman's opening brief for having allegedly given improper advice to the Receiver, three asserted instances of such allegedly improper advice being specified, to wit:

(1) He and the Receiver took over the Trust's bank account and requested managers to turn over money to them, and in fact collected money from one of the managers, before the Receiver was appointed.

(2) Whyte failed to advise the Receiver that nonperformance of the contracts with Air Pollution Control, Inc. might result in criminal prosecution.

(3) He allegedly erroneously assumed that Richman had no right to contact the Receiver's bookkeeper, Mr. Harrison, concerning the Trust property or the acts of the Receiver.

These points will be answered briefly and in their listed order.

As to (1), the Receiver was appointed by a court order made and filed on November 30, 1953. [R. 21-25.] The steps allegedly taken by the Receiver and his attorney were taken on December 1, 1953, after the Receiver's appointment. [R. 552, 947-948.] The only action taken at the bank was to transfer the former Richman Trust account to the Receiver's name. [R. 552.] This was an urgent matter. [R. 554-555.]

It is true that the Receiver did not file his bond and take his oath of office until December 2. [R. 25-26.] Technically, therefore, the Receiver and his attorney had no authority to take any of the steps which they did take on December 1. Richman does not contend, however, nor is there any evidence in the record to show, that the slightest harm resulted to anyone from such action or that one cent of the money collected from the apartment house manager was not accounted for. We may well inquire

whether such petty fault finding does anything more than waste the time of this Court.

As to (2), why should Whyte have advised the Receiver that non-performance of the contracts with Air Pollution Control, Inc. might result in criminal prosecution? About December 30, 1953, he told the Receiver that the contracts were binding and instructed him to carry them out, "to go ahead." [R. 388, 556-557, 753.] He had no reason to believe that his instructions would not be, or were not being, obeyed. He was not informed at the time that performance of the contracts for installation of the pollution control facilities was being held up during the month of January, 1954. [R. 943.] Neither was he advised that the Receiver had received the notice issued by the Air Pollution Control District on January 13, 1954. [R. 543-544.] The first time he knew or reasonably could have suspected that anything was wrong was on or about January 27, when he learned from Harrison that a criminal complaint either was or was about to be issued. [R. 557-558.]

Finally, as to (3), what difference does it make whether Whyte assumed, either rightly or wrongly, that Richman had no right to contact Harrison, the Receiver's bookkeeper? It is not contended that Whyte ever took any action in reliance upon his assumption or that Richman was prevented from obtaining the information he desired.[9]

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[9]Actually Whyte had every reason to assume as he did. The court's order appointing the Receiver expressly forbade Richman from "interfering directly or indirectly, with the administration of the receivership." [R. 24.] Calling on the Receiver's employee and questioning him about matters pertaining to the receivership, without first obtaining the permission of the Receiver or his counsel to do so [R. 641-643], would clearly appear to be an indirect interference with the administration of the receivership.

The Issues Presented.

The principal issue presented on this appeal with reference to the Receiver and his attorney is as follows:

Did the District Court abuse its discretion in awarding a fee of $6,000.00 to the Receiver and a fee of $1,800.00 to his attorney?

There are two other minor issues, to wit:

(1) Did the District Court err in ordering the Receiver to reimburse himself from the moneys in his possession to the extent of $89.20, paid out by him for copies of his deposition and that of his deposition and that of his attorney, said depositions having been taken by Richman and used at the hearing on the Receiver's report and petition for fees and the petition of his attorney for fees?

(2) Did the District Court err in refusing to disqualify itself to settle the Receiver's account and to award fees to the Receiver and his attorney?

Summary of Argument.

1. The District Court did not abuse its discretion in awarding a fee of $6,000.00 to the Receiver and a fee of $1,800.00 to his attorney.

2. The District Court did not err in ordering the Receiver to reimburse himself from the moneys in his possession to the extent of $89.20, paid out by him for copies of his deposition and that of his attorney.

3. The District Court did not err in refusing to disqualify itself to settle the Receiver's account and to award fees to the Receiver and his attorney.

ARGUMENT.

I.

The District Court Did Not Abuse Its Discretion in Awarding a Fee of $6,000.00 to the Receiver and a Fee of ~~$18,000.00~~ 1800.00 to His Attorney.

It is axiomatic that the amount of compensation awarded to a receiver and his counsel is a matter within the sound discretion of the trial court and will not be disturbed upon appeal in the absence of a clear showing that the trial court has abused its discretion. (*In re Cash-Papworth, Grow-Sir* (2d Cir., 1913), 210 Fed. 24, 26; *Drilling & Exploration Corporation, et al. v. Webster* (9th Cir., 1934), 69 F. 2d 416, 418; *Venza v. Venza* (1951), 101 Cal. App. 2d 678, 680.) This principle is well stated in the case of *Venza v. Venza* (*supra*), to wit:

> "The rule is well established that the compensation to be allowed receivers and their attorneys is primarily within the sound discretion of the trial court. This is necessarily so, for, as the court stated in *Kan v. Tsang,* 90 Cal. App. 2d 538 [203 P. 2d 86], the trial court is 'in a better position to know the necessity for the services performed by the receiver and his attorney and to assess their reasonable value' (p. 541) than is a reviewing court. Thus, it follows that in the absence of a clear showing of an abuse of discretion by the trial court this court would not be justified in interfering therewith. (*Adams v. Woods,* 8 Cal. 306, 322.) We conclude that the record does not disclose such a showing by defendants." (P. 680.)

The trial court can not be said to have abused its discretion where there is substantial evidence in the record to support its finding as to the reasonableness of the

amount allowed. (*Estate of McLaughlin* (1954), 43 Cal. 2d 462, 465-466 (trustees' fees); *Estate of Griffith* (1950), 97 Cal. App. 2d 651, 655 (trustee's fees); *Re Dehner's Estate* (1941), 230 Iowa 490, 298 N. W. 656, 657 (attorney's fees).) This rule is well expressed in *Estate of McLaughlin* (*supra*), a recent decision by the Supreme Court of California, stated in the following language:

> "Pursuant to section 1122 of the Probate Code,* the trustees must be allowed 'such compensation for services as the court may deem just and reasonable.' The allowance rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of a manifest showing of abuse. (*Estate of McLellan,* 8 Cal. 2d 49, 55 [63 P. 2d 1120]; *Estate of Mills,* 119 Cal. App. 2d 8, 9 [258 P. 2d 1028]; *Estate of Willardson,* 101 Cal. App. 2d 777, 780 [226 P. 2d 369].) The trustee must present to the trial court satisfactory evidence of the accuracy and propriety of the items in his account (*Purdy v. Johnson,* 174 Cal. 521, 527 [163 P. 893]; *Estate of McCabe,* 98 Cal. App. 2d 503, 505 [220 P. 2d 614]); but the sole question before an appellate court when the fee allowed him is attacked as excessive is whether there is substantial evidence to support the trial court's finding. (*Estate of Griffith,* 97 Cal. App. 2d 651, 655 [218 P. 2d 149].) A finding that such a fee is a reasonable one states the ultimate fact in issue and is formally sufficient. (*Estate of Janes,*

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*" 'On the settlement of each such account the court shall allow the trustee his proper expenses and such compensation for services as the court may deem just and reasonable. Where there are several trustees it shall apportion the compensation among them according to the respective services rendered. It may, in its discretion, fix a yearly compensation for the trustee or trustees, to continue as long as the court may deem proper.' "

18 Cal. 2d 512, 514 [116 P. 2d 438]; *cf., Estate of Willardson, supra,* 101 Cal. App. 2d at 780; *Estate of Scherer,* 58 Cal. App. 2d 133, 138-139 [136 P. 2d 103].)" (Pp. 465-466.)

In its order of November 19, 1954, from which Richman's appeal herein is taken, the District Court made the following findings with reference to the reasonableness of the fees allowed the Receiver and his attorney:

> ". . . the reasonable value of the services of Roy E. Hallberg as receiver is the sum of $6,000.00, which the Court finds to be the reasonable value of said services, and his fees are hereby fixed at the sum of $6,000.00; the reasonable value of the services of John Whyte, as attorney for the receiver in this matter, is the sum of $1,800.00, and his fees are hereby fixed at the sum of $1,800.00, which the Court finds to be the reasonable value thereof." [R. 194.]

There is ample evidence to support the trial court's finding that the reasonable value of the Receiver's services was $6,000.00. Gross receipts collected by the Receiver during the three months period of the receivership amounted to $94,153.59. [R. 105.] There was evidence in the record that various percentages, including 5% and 6% of gross income, would be a reasonable management fee. [R. 187, 374, 316.] Although 6% of $94,153.59 would be $5,649.21, and 5% of $94,153.59 would be $4,707.67, there were other factors present which fully justified the Court in raising the fee to $6,000.00, or what amounts to roughly 6.3% of gross income.

In the first place, the receivership lasted only three months. The Receiver hardly had time to familiarize himself with the properties under his control and the problems incident to their operation and to install his own

system of management and bookkeeping before the receivership was terminated and he was forced to surrender possession of the assets and account for his stewardship. Naturally, this state of affiairs placed a far greater burden upon him than would have resulted had he been given more time in which to put his house in order. [R. 187.]

In the second place, the Receiver was compelled to spend four and one-half days in court defending his administration of the receivership against a violent attack thereon by Richman, an attack which the District Court found to be completely unjustified. The Receiver also was obliged to devote considerable time out of court to preparing his defense to the attack on his administration and to the taking of his deposition by Richman. [R. 166-169.]

In the third place, in the words of the trial court, the Receiver was treated by Richman and his counsel "with less respect than I have seen embezzlers treated when I was handling the criminal calendar of the court" [R. 857-859], and was subjected to "a most critical and insulting scrutiny of his every act and omission in his administration." [R. 187.] The Receiver is certainly entitled to some additional compensation for being forced to submit to such indignity and abuse.

There is likewise ample evidence to support the trial court's finding that the reasonable value of the attorney's services is at least $1,800.00. Hubert Laugharn, a well-known Los Angeles attorney with wide experience in the field of receivers and receiverships [R. 559-561], testified that compensation of $1,000.00 a month to the Receiver's attorney for each of the three months of the receivership would not be excessive. [R. 564-565.] Paul Fussell, another prominent Los Angeles attorney [R. 614-616], testi-

fied that in his opinion the reasonable value of the attorney's further services in defending the Receiver against Richman's attack on his report and petition for fees alone was worth from $1,000.00 to $1,200.00. [R. 616-619.] In this connection it has been held that a trial court has authority to compensate a receiver's attorney for services rendered by him in defending his client against baseless charges of having failed in the proper performance of his duties as receiver. (*Missouri & K. I. Ry. Co. v. Edson* (8th Cir., 1915), 224 Fed. 79.

Even if the District Court had failed to make any finding with respect to the reasonableness of the amounts allowed as fees to the Receiver and his attorney, it is obvious that it was in a better position to assess the reasonable value of their services than is this Court, and unless this Court can say that the compensation allowed is not supported by the evidence, it should affirm the award. (*Kan v. Tsang* (1949), 90 Cal. App. 2d 538, 541.)

A few comments are in order respecting the cases cited by appellant Richman at pages 59-62 of his opening brief.

We have no quarrel with the statement of the considerations which should govern a court of equity in fixing the compensation of receivers, as they are set out on page 60 of Richman's opening brief in a quotation from the case of *Eames v. H. B. Claflin Co.* (2d Cir., 1916), 231 Fed. 693. Richman's brief, however, omits a portion of the language quoted from this case, which reads as follows:

> "* * * The amount of a receiver's compensation does not depend upon the special qualifications or standing of the person appointed, or the demands made upon his time by private business * * *." (P. 695.)

In *Cake v. Mohun* (1896), 164 U. S. 311, 41 L. Ed. 447, cited at pages 60-61 of Richman's opening brief, the appellate court, while recognizing that it would have fixed the receiver's compensation at a considerably less amount had the matter been presented to it originally, refused to tamper with the amount fixed by the trial court upon the ground that "Great consideration will be paid to the concurring views of the auditor or master and the [lower] courts respecting a mere matter of amount." (P. 318.)

As for the case of *Walton N. Moore Dry Goods Co. v. Lieurance* (9th Cir.), 38 F. 2d 186, cited at page 61 of Richman's opening brief for the proposition that a receiver's prior earnings are relevant in determining his fees, we have no quarrel with this proposition either. We do desire, however, again to call attention to the fact that for three or four years prior to January, 1947, the Receiver received a net salary, before taxes, of $40,000.00 a year [R. 891-892, 367-368], and that from October, 1948, to April, 1951, he received a salary of $20,000.00 per year from another employer. [R. 879-881.]

II.

The District Court Did Not Err in Ordering the Receiver to Reimburse Himself From the Monies in His Possession to the Extent of $89.20, Paid Out of Him for Copies of His Deposition and That of His Attorney.

The depositions of the Receiver and his attorney were taken by Richman for use upon the hearing on the Receiver's report and petition for fees and his counsel's petition for fees. [R. 238.] They were introduced in evidence at that hearing. [R. 250, 544.] Under Rule 54(d), Federal Rules of Civil Procedure, except when express provision is made therefor in a statute of the

United States or in the Federal Rules of Civil Procedure, "costs shall be allowed as of course to the prevailing party unless the court otherwise directs, . . ." The Receiver and his attorney were prevailing parties and Richman was a losing party in that the District Court found the Receiver's report "to be full and correct" [R. 193] and awarding fees to the Receiver and his counsel. It is well settled that the cost to the prevailing party of obtaining a copy of his deposition taken by the losing party is taxable against the losing party. (*Schmitt v. Continental-Diamond Fibre Co.* (N. D., Ill., 1940), 1 F. R. D. 109.)

III.

The District Court Did Not Err in Refusing to Disqualify Itself to Settle the Receiver's Account and to Award Fees to the Receiver and His Attorney.

The argument on this point has already been sufficiently developed under subdivision B of our statement of the case appearing at pages 11 to 12 hereof.

It is respectfully urged that the order appealed from should be affirmed.

Respectfully submitted,

JOHN WHYTE,
Attorney for Appellee Roy E. Hallberg, as Receiver.

JOHN WHYTE,
In Propria Persona.

FITZPATRICK & WHYTE,
Of Counsel.